2-11-1976

William Walker v. Dr. J. Meredith and St.. Mary & Elizabeth Hospital

Appellee's Brief 1975-SC-1093

APPELLEE'S BRIEF

552 SW 2d 660

SUPREME COURT OF KENTUCKY

File No. 75-1093

WILLIAM WALKER, - - - - **Appellant,**

versus

DR. J. MEREDITH and
STS. MARY & ELIZABETH HOSPITAL, - **Appellees.**

APPEAL FROM JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, SEVENTH DIVISION
HON. THOMAS A. BALLANTINE, JR., JUDGE

BRIEF FOR APPELLEE, DR. J. MEREDITH

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This is to certify that copies of the within Brief have been served on Edward T. Brady, Jr., Esq., 1925 Commonwealth Building, Louisville, Kentucky, 40202, Counsel for Appellant; Benjamin Mazin, Esq., 302 Kentucky Home Life Building, Louisville, Kentucky, 40202, Counsel for Appellant; William O. Guethlein, Esq., 2300 One Riverfront Plaza, Louisville, Kentucky, 40202, Counsel for Appellee, Sts. Mary & Elizabeth Hospital; and Honorable Thomas A. Ballantine, Jr., Common Pleas Branch, Seventh Division, Jefferson Circuit Court, Louisville, Kentucky, 40202, Trial Judge, pursuant to RCA 1.250.

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May it please the Court:

COUNTERSTATEMENT OF THE CASE

The Appellant, William Walker (hereinafter called "Walker") had injured himself at work when water from a high-pressure hose cut the top of his foot. The wound was dressed and sutured by the Appellee, Dr. J. Meredith (hereinafter called "Dr. Meredith") in the emergency room of the co-appellee, Sts. Mary & Elizabeth Hospital (hereinafter called "the hospital"). Dr. Merdith discharged Walker with instructions to see his family physician the next day (TR 24).* As

*The Transcript of Record will be abbreviated as TR.

the wound healed the scar tissue became sore, and eventually Walker consulted Dr. John A. Hemmer, who surgically removed a portion of the scar tissue (Hemmer depo. 7). The tissue thus removed was examined in a laboratory, and the lab report indicated a reaction to "*microscopic** fragments of foreign body" (Hemmer depo. 8).

This litigation was initiated by the filing of a complaint in the Jefferson Circuit Court on February 2, 1975 by Walker, who alleged that Dr. Meredith was negligent in his treatment of his wound, which alleged malpractice resulted in the necessity of a second operation and the other damages of which he complains. There was a delay in getting service of process on Dr. Meredith, but on April 18, 1975 an answer was filed on his behalf (TR 8). On that same day, interrogatories were propounded to Walker in order to ascertain the details of his complaint and also to ascertain what expert witnesses he planned to use (TR 9-10). Walker filed his answers to these interrogatories on May 1, 1975 (TR 11-13), in short saying that Dr. Meredith negligently allowed a foreign object to remain in his wound, and that he would use no other witnesses on his behalf other than the subsequent treating physician, Dr. John A. Hemmer, because in his opinion this was a res ipsa loquitur case. Walker gave his deposition on June 10, 1975, and then his counsel took the deposition of Dr. John A. Hemmer, testifying on Walker's behalf, on August 1, 1975.

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*Emphasis, unless otherwise indicated, is added by counsel.

After Dr. Hemmer testified that in his opinion, the treatment given to Walker was entirely adequate (Hemmer depo. 17), Dr. Meredith filed an affidavit on his own behalf and moved for a summary judgment on August 25, 1975 (TR 26-28). That motion for summary judgment was scheduled to be heard on September 8, 1975 (TR 26), but at Walker's request, it was passed to October 24, 1975 so that he could take additional proof. The only additional proof which Walker deemed necessary to take was the deposition of Dr. Meredith. Dr. Meredith had previously testified by affidavit (TR 28) that his treatment of Walker was in accord with the accepted standards of medical treatment for similar cases and did not deviate from such standards, and further, that nothing he did or failed to do caused or contributed to cause any of Walker's problems. He testified to this effect again during his deposition, and since there was no expert testimony to the contrary, summary judgment was entered dismissing Walker's complaint on October 24, 1975. From that judgment Walker now appeals.

ARGUMENT

I. Summary Judgment Dismissing Plaintiff's Complaint in a Medical Malpractice Case Was Proper Because the Plaintiff Failed to Proffer Any Competent Expert Medical Testimony as to Negligence, and the Doctrine of Res Ipsa Loquitur Is Not Applicable.

The most basic principle of medical malpractice law in this Commonwealth is that the plaintiff is required, in cases of this type, to show by competent expert medical testimony that the care rendered by the defendant-physician deviated from an accepted medical standard of treatment in similar cases. *Blair* v. *Eblen,* Ky., 461 S. W. 2d 370 (1970); *Stokes* v. *Haynes,* Ky., 428 S. W. 2d 227 (1968); and *Neal* v. *Welker,* Ky., 426 S. W. 2d 476 (1968). On page 7 of his brief, Walker attempts to avoid this rule of law arguing that in his case the doctrine of res ipsa loquitur applies, citing 10 ALR 3rd 9 and *Butts* v. *Watts,* Ky., 290 S. W. 2d 777 (1956).

The first paragraph of the annotation cited by Walker is of considerable interest. It reads as follows:

> This annotation collects and discusses the cases which have discussed liability of a medical practitioner for the failure to remove *objects or substances inserted, intentionally or unintentionally, in the patient's body in the course of surgery or treatment without any intention of leaving them there permanently.* 10 ALR 3rd at 15.

The italicized portion of the sentence quoted above is of importance as it relates to one of the elementary

requirements of the doctrine of res ipsa loquitur, namely, that the instrumentality involved must be within the sole control of the defendant. The annotation goes on to list literally hundreds of medical malpractice cases against surgeons wherein an instrument, such as a sponge or a pair of scissors, or some other surgical instrument, was inadvertently or unintentionally left within the patient. In the present case, the "foreign object" involved consisted of microscopic fragments (Hemmer depo. 8) which obviously were not inserted by Dr. Meredith and which could not possibly have been discovered during the course of Dr. Meredith's emergency room treatment of Walker (Hemmer depo. 12). These microscopic fragments were *embedded* within Walker's tissues so that irrigation of his wound *would not have removed them* (Hemmer depo. 19). It was further established *and uncontradicted* that the particular miscroscopic fragments would not have shown up on an X-ray (Meredith depo. 12).

The doctrine of res ipsa loquitur has *never* been applied in cases such as this where the "foreign object" was within the patient before the patient ever saw the doctor-defendant.

It should also be pointed out that another basic requirement for the application of the doctrine of res ipsa loquitur is that in the absence of negligence such a result would not have obtained. In the present case the uncontradicted testimony is that a second operation with respect to a wound does not at all mean that

the wound was improperly treated the first time (Meredith depo. 64 and Hemmer depo. 22).

The only case which Walker cites in support of his argument that the doctrine of res ipsa loquitur applies is the *Butts* case, *supra*. *Butts* was a dental malpractice case in which the dentist attempted to extract the plaintiff's tooth, which broke in the process, leaving a fragment in the socket. The limited holding of this Court with respect to res ipsa loquitur in that case was:

> It is within the realm of *common knowledge of laymen* that to leave a part of a broken tooth in the socket, which was easily discovered by another dentist, is malpractice unless proof tending to excuse the act is introduced. This is knowledge that is not exclusively within the province of the practice of the dental profession. A juror needs no scientific enlightenment to see at once that leaving a portion of a broken tooth in the socket can be accounted for on no other theory than negligence.

In no way is the *Butts* case factually analogous to the present case, wherein the "foreign objects" involved *could not even be detected by X-rays*. The present case is clearly one in which expert testimony would have been required as to (1) the acceptable medical practice with respect to the extent of an *examination* to determine the presence of microscopic fragments in a wound, and (2) the acceptable medical practice with respect to the *removal* of such foreign fragments when the risk of further medical procedures to remove such *possibly* existing fragments may exceed the risk involved in possibly leaving them within the body.

II. In Any Event, Summary Judgment Was Also Proper Because the Plaintiff Failed to Offer Expert Medical Testimony as to Causation.

For purposes of argument only, let us assume for a moment that Walker had met his burden of proving by expert testimony that Dr. Meredith was negligent in his treatment. Walker testified by affidavit that the act of negligence of which he complains is that the hospital nurse who attended him only washed away the outside of his wound without probing the inside of his wound and without pouring any fluids into the wound itself (TR 32). For purposes of summary judgment, the trial court was asked to assume that Walker's account of his treatment in the emergency room was both truthful and completely accurate, and this Court is, for purposes of argument, asked to make the same assumption. The question then immediately arises, as to whether or not the alleged failure of Dr. Meredith, or the nurses, to irrigate Walker's wound in any way caused him to have to undergo a second operation.

The uncontradicted medical testimony by *Walker's own medical expert* is that since the microscopic fragments were actually embedded within his tissues, *irrigation would in no event have removed these particles* (Hemmer depo. 19).

This Court held in no uncertain terms, in *Walden* v. *Jones,* Ky., 439 S. W. 2d 571 (1969), that in a medical malpractice case, the plaintiff has the burden of proving, by expert testimony, that the alleged negligence was also the proximate cause of the plaintiff's

claimed injuries. This Court cited, with approval, an annotation entitled "Proximate cause in malpractice actions", 13 ALR 2d 22, which states:

> The courts are agreed that proof of causation must go beyond a showing of a possibility that the injuries arose from the defendant's negligence or lack of skill, since the jury will not be permitted to speculate as to the causes of injury. 439 S. W. 2d 574.

This Court went on to say:

> * * * We think that none of those decisions can fairly be construed to excuse the plaintiff in a malpractice suit from the necessity of presenting evidence reflecting *medical reasonable probability* of proximate cause for the claimed adverse result as related to the charge of negligence. 439 S. W. 2d 576.

In *Burke* v. *Miners Memorial Hospital Association,* Ky., 381 S. W. 2d 758 (1964), a medical malpractice case, this Court wrote:

> If we assume arguendo that the evidence offered establishes negligence, there is still no evidence that that negligence was the proximate cause of the death. 381 S. W. 2d 759.

Not only is the plaintiff required to introduce expert medical testimony as to causation, but that evidence must indicate a probable, rather than a possible, cause. In *Huffman* v. *SS. Mary & Elizabeth Hospital,* Ky., 475 S. W. 2d 631 (1972), this Court cited *Holbrook* v. *Rose,* Ky., 458 S. W. 2d 155 (1970) and held:

> * * * The type of evidence that will support a reasonable inference must indicate the *probable* as distinguished from a *possible* cause. 475 S. W. 2d 633. Emphasis supplied by the Court.

In the present case, not only is there a complete *absence* of any proof by the plaintiff as to causation, but on the contrary, all the affirmative proof stands uncontradicted to the effect that nothing Dr. Meredith did or may have failed to do in any way caused the problem of which Walker complains (Hemmer depo. 17 and 19 and Meredith affidavit, TR 28).

III. Summary Judgment Was Proper Since There Was No Genuine Issue as to Any Material Fact.

Walker argues, on page 5 of his brief, that there were issues in dispute as to whether or not X-rays were taken and as to whether or not a tetanus shot was given. Again, since this case was decided on summary judgment, these issues should be resolved in accordance with Walker's testimony that no X-rays were taken and that no tetanus shot was given. Nevertheless, the uncontradicted expert medical testimony is to the effect that X-rays would not have shown these non-metalic, microscopic particles (Meredith depo. 12); and since Walker does not claim to suffer from lockjaw, the fact as established by him that no tetanus shot was given is certainly immaterial.

On page 3 of his brief, Walker argues that there is a material issue as to whether or not his wound was properly cleansed. He argues that his own affidavit

and deposition are admissible to establish this fact under the exception to the rule requiring expert testimony in medical malpractice cases as established by *Jewish Hospital Association of Louisville, Kentucky, Inc.* v. *Lewis,* Ky., 442 S. W. 2d 299 (1969). The holding of the *Jewish Hospital* case cannot be stretched so far. In that case the problem arose when a hospital orderly attempted to insert a catheter which was too large, resulting in immediate and unusual bleeding. This Court simply held that a jury of laymen could properly find negligence in the insertion of such a catheter without the necessity of expert testimony.

In the present case, however, there *was* expert medical testimony as to the alleged negligent act. Dr. Meredith testified that in the course of injecting Walker's wound with anesthetic and in the course of sewing it up, *he examined the wound* and that in his opinion the *wound had been properly cleansed* (Meredith depo., pp. 63, 66 and 67). Additionally, Dr. Hemmer, again testifying on behalf of the plaintiff, stated that in his opinion, since there was no resulting infection, it was clear to him that *the wound had been sufficiently cleansed* (Hemmer depo. 20). Dr. Hemmer went on to testify that in an injury of the kind that Walker had, it is quite possible for the wound to be treated in a proper manner and yet have some particles remain (Hemmer depo. 22). He went on to testify that he himself has closed many wounds sometimes knowing that he had left foreign bodies within the wound:

> A. Well, a lot of them did. We are talking about, you know, much bigger wounds than this injury. I have left foreign material in wounds. We do it all the time. I mean if some of the foreign material has gone beyond the limits of the wound, we feel like it is unnecessary to remove it lots of times. And a lot of foreign materials are inert and don't really cause much reaction after the original reaction subsides. And as we all know, there are millions of people running around with bullets, scrap metal and other foreign bodies in them, and they never cause any trouble (Hemmer depo. 23).

But, assuming that the wound in question was not cleansed *at all,* there is still no proof that such a failure to cleanse the wound caused the second operation wherein the embedded, microscopic fragments were removed. On the contrary, Dr. Hemmer testified:

> No. Irrigation *wouldn't* remove the foreign bodies in any event because this is (sic) impregnated small particles that couldn't be seen. It is like a stone in concrete. You know, it is there, *you can't see it. You couldn't pick it out* (Hemmer depo. 19).

On pages 4 and 5 of his brief, Walker attempts to distinguish the authorities upon which the trial court relied in granting summary judgment and at the same time to create an issue of fact by writing:

> (a) The foreign materials could have been found by Dr. Meredith;
>
> (b) The offending particles were actually found and removed without the feared damage by Dr. Hemmer;

(c) A good thorough cleansing according to the accepted standards of medical treatment for similar cases *might* (our emphasis) well have removed the offending foreign matter, even though microscopic and this probability is "within the scope of common knowledge and experience of laymen", see *Jewish Hospital* v. *Lewis* above.

With respect to Walker's points (a) and (b) above, the *only* possible explanation for his failure to cite this Court to the record to establish these points is that the record is *absolutely to the contrary.* Dr. Hemmer, Walker's expert, testified that since the particles in question were microscopic in size and since they were embedded within Walker's tissues, they could *not* have been discovered at the first operation (Hemmer depo. 12).

Dr. Hemmer's testimony is also exactly contrary to Walker's point (b) above. Dr. Hemmer testified:

> Well, first of all, I examined this tissue to see if there was (sic) any foreign bodies, glass, wood, clothing, et cetera, and I could see a whitish or greyish tissue which appeared to have some inflammation, was a little bit edamatous, but *there was no evidence of any foreign particles.*
>
> There was no black, blue, green or any odd colored object in that tissue. If there was any foreign body in it, then it was the same color as the tissue itself—I was a little bit surprised maybe that I didn't see some, but it was not there. (Hemmer depo., 10-11.)

Even looking for them, Dr. Hemmer could not find them! The foreign particles were not found until the

tissue removed by Dr. Hemmer was sent to the laboratory for examination (Hemmer depo. 8), and even at that Dr. Hemmer was also sure that he had *not* removed all of the tissue which might *possibly* have contained foreign particles (Hemmer depo., pp. 7 and 8).

With respect to Walker's point (c) above, when one considers that the microscopic foreign fragments referred to therein were actually embedded within Walker's tissues (Hemmer depo., 19 quoted *supra*), one wonders what "common knowledge and experience" he is talking about.

The record in this case clearly establishes that Walker made no attempt to counter the effect of his own expert's, Dr. Hemmer's, testimony or to contradict the affidavit of Dr. Meredith. In sustaining a motion for summary judgment in another medical malpractice case, *Neal* v. *Welker, supra,* this Court wrote as follows:

> * * * When the moving party has presented evidence showing that despite the allegations of the pleadings there is no genuine issue of any material fact, it becomes incumbent upon the adverse party to counter that evidentiary showing by some form of evidentiary material reflecting that there is a genuine issue pertaining to a material fact. *Tarter* v. *Arnold,* Ky., 343 S. W. 2d 377.
>
> * * * * * * *
>
> Upon his motion to set aside the summary judgment, the appellant filed affidavit asserting "that the plaintiff herein both can and will if granted opportunity, produce competent evidence that

> Harry L. Neal was not treated in a manner accepted by the medical profession; was in fact ignored by Drs. Welker and Welborn who until the autopsy had no idea of the extent or nature of the injury and failed completely to treat him for it." There is no suggestion by the appellant as to the source of any such evidence, nor is there any reason advanced why the alleged evidentiary material had not been presented in some form before the submission of the case upon summary judgment. In this state of the record, we must hold that the summary judgment was properly granted. The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since "hope springs eternal in the human breast." The hope or bare belief, like Mr. Micawber's, that something will "turn up," cannot be made basis for showing that a genuine issue as to a material fact exists. *Conley* v. *Hall,* Ky., 395 S. W. 2d 575.

CONCLUSION

In the present case, Walker made absolutely no attempt to show that Dr. Meredith's treatment of him fell below the accepted standard of medical treatment for similar cases. Of equal importance, Walker made absolutely no attempt to show that Dr. Meredith's treatment of him—negligent or not—was the cause or contributed to cause any of the injuries, pain, suffering or illnesses of which he complains. It is time now for the curtain to fall, and the summary judg-

ment of the trial court dismissing Walker's claim should be affirmed.

Respectfully submitted,

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